

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RUTH A. EBNER and U.S. POSTAL SERVICE,  
MAIN POST OFFICE, St. Louis, MO

*Docket No. 02-2155; Submitted on the Record;  
Issued January 2, 2003*

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DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

On February 29, 1996 appellant, then a 41-year-old clerk, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that she sustained a lower back injury while lifting a mail tray earlier that same day. She ceased working the day of her injury and later resigned effective April 4, 1996.

In a decision dated June 19, 1996, the Office denied appellant's claim on the basis that she failed to establish a causal relationship between her claimed back strain and her alleged February 29, 1996 employment injury.

Appellant subsequently filed several requests for reconsideration. In response, the Office reviewed appellant's claim on the merits and denied modification on three occasions. The Office issued its most recent merit decision on March 5, 1999.

Appellant filed her latest request for reconsideration on February 6, 2001. In a decision dated February 20, 2001, the Office found that appellant's request was untimely and failed to present clear evidence of error. Pursuant to an order of the Board dated May 22, 2002,<sup>1</sup> the Office reissued its February 20, 2001 decision on July 1, 2002.

The Board finds that the Office properly refused to reopen appellant's case for merit review under 5 U.S.C. § 8128(a).

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<sup>1</sup> Docket No. 01-1587.

Section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>3</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.<sup>4</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>5</sup> One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>6</sup>

In this case, the one-year time limitation begins to toll the day the Office issued its March 5, 1999 decision, as this was the last merit decision in the case.<sup>7</sup> As appellant's request for reconsideration was dated February 6, 2001, she is not entitled to review of her claim as a matter of right.

In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of the Office in its "most recent merit decision."<sup>8</sup> In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>9</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.<sup>10</sup> The evidence must be positive, precise and explicit, and it must be apparent on its face that the Office committed an error.<sup>11</sup> Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>12</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>13</sup> The evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>4</sup> Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.607 (1999).

<sup>6</sup> 20 C.F.R. § 10.607(a) (1999).

<sup>7</sup> *See Veletta C. Coleman*, 48 ECAB 367, 369 (1997).

<sup>8</sup> 20 C.F.R. § 10.607(b) (1999).

<sup>9</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>10</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>11</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>12</sup> *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>13</sup> *See Leona N. Travis*, *supra* note 11.

must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.<sup>14</sup>

Appellant did not submit any additional medical evidence with her February 6, 2001 request for reconsideration. Therefore, she failed to demonstrate clear evidence of error. Accordingly, the Office properly declined to reopen appellant's case for merit review under section 8128(a) of the Act.

The July 1, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
January 2, 2003

Michael J. Walsh  
Chairman

Alec J. Koromilas  
Member

Willie T.C. Thomas  
Alternate Member

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<sup>14</sup> *Thankamma Mathews*, 44 ECAB 765, 770 (1993).